

hazardous materials. Further, ATF regulates all mixtures that contain any of the materials it lists as explosives. ATF does not define a lower limit at which a mixture would cease to meet the definition for an explosive. The DOT definition, by contrast, depends on test results of materials packaged for shipment to determine whether a material should be classed as an explosive under the HMR. Thus, if a mixture is tested and does not exhibit explosive properties, it would not be classed as an explosive under the HMR, even though the mixture might contain a material that, by itself, would be classed as an explosive.

Moreover, the ATF explosives list includes dinitrophenol, guncotton, nitrostarch, sodium picramate, and several other materials that DOT regulates as a different class of hazardous materials when combined with water. When combined with water, these materials may not exhibit explosive properties and, thus, do not meet the DOT definition for an explosive. DOT regulates these materials, with specified percentages of water, as Division 4.1 (flammable solid) materials.

ATF regulates ammonium nitrate-fuel oil mixtures and ammonium nitrate explosive mixtures as explosive materials. Under the HMR, ammonium nitrate is classed as a Division 1.1 explosive, and ammonium nitrate-fuel oil mixtures are classed as Division 1.5 explosives. However, some mixtures that include ammonium nitrate among their components are classed as Division 5.1 (solid oxidizer) materials because they require further processing before they can be used to produce a practical explosion. Again, the difference exists because the DOT classification criteria depend on testing to determine whether a material exhibits explosive properties; if a material is tested and found not to meet the DOT definition, it is not regulated as an explosive for purposes of the HMR.

A major difference between the ATF and DOT requirements for regulating explosives is how the agencies treat military and government shipments. In accordance with 18 U.S.C. 845, ATF generally does not regulate explosives being delivered to any agency of the United States or any state or political subdivision thereof; or explosives manufactured under the regulation of the military department of the United States or transported on behalf of the military department of the United States or transported to arsenals, navy yards, depots, or other establishments owned by, or operated on behalf of, the United States. Under the HMR, by contrast,

government and military shipments of explosives are regulated if such shipments are transported by commercial carriers rather than government or military personnel.

For purposes of SEA, DOT compared the list of materials that ATF regulates as explosives with the definitions for different classes of hazardous materials regulated under the HMR and assessed the security risks associated with the transportation of such materials. DOT concluded that a mixture that does not meet the definition of a Class 1 material under the HMR generally does not pose a sufficient security risk when transported in commerce to warrant detailed employee background checks at this time. Such mixtures may meet the definition of a different hazardous class, in which case they are subject to applicable security requirements in the regulations of RSPA, FMCSA, or USCG regulations, or they may not meet the definition of any hazard class, in which case they are not regulated as hazardous materials under the HMR.

DOT further concluded that a material regulated as an explosive by ATF but as a different class of hazardous material under the HMR, such as certain wetted materials and ammonium nitrate mixtures, generally will be subject to applicable security requirements in HM-232 (which is the final rule issued by RSPA on March 25, 2003 at 65 FR 14510) or in TSA, FMCSA, or USCG regulations, as incorporated into the hazardous materials regulations in the RSPA rule that accompanies this rule. If required to be placarded, shipments of such materials will be subject to the background check requirements mandated in this rule when transported by motor carrier and to the security plan requirements in HM-232. When shipped in amounts that do not require placarding, such shipments do not pose a security threat when transported in commerce sufficient to warrant detailed employee background check requirements at this time.

Generally, DOT determined that the placarding thresholds established in the HMR for explosives shipments represent explosives that pose the most significant security threat when transported in commerce. Explosives in the following quantities must be placarded in accordance with HMR requirements:

- (1) Any quantity of Division 1.1, 1.2, or 1.3 explosives;
- (2) More than 454 kg of Division 1.4, 1.5, or 1.6 explosives.

Examples of Division 1.4 explosives include toy caps, signal devices, flares, and distress signals. In quantities less than 454 kg, such explosives generally

do not present a significant security threat involving their use during transportation for a criminal or terrorist act. Similarly, Division 1.5 and 1.6 explosives are sufficiently insensitive that, in amounts below 454 kg, they generally do not present a significant security threat.

Although there are differences between the ATF and DOT definition of explosives, TSA and DOT believe that any gaps between the definitions which cover either the type of explosive or the amount of explosive in transportation do not give rise to security concerns that warrant additional regulation at this time. The security and safety regimes established in this rule and the FMCSA and RSPA regulatory programs address the transportation of explosives by persons posing a security threat.

It is important to note, however, that TSA continues to analyze explosive, radioactive, organic, flammable, and corrosive materials, and medical and hazardous wastes in transportation to determine whether additional security procedures are necessary to protect the public, infrastructure and the transportation system. TSA anticipates that, after the completion of risk analyses, additional regulations will evolve that are narrowly tailored to address specific products, processes, and threat information, regardless of whether they must be placarded in transportation. In addition, TSA is considering whether a larger group of individuals should be required to undergo fingerprint-based criminal history background checks and whether a different security check would effectively capture the individuals who are bent on using the transportation network to commit terrorist acts.

Based on the foregoing, the TSA, FMCSA, and RSPA rules now regulate the security threat posed by the transportation of explosives by commercial motor vehicle incident to and in connection with the commercial transportation of explosives, and therefore the prohibitions of 18 U.S.C. 842(i) do not apply to persons while they are engaged in such transportation.

#### Summary of the Interim Final Rule

This interim final rule implements section 1012 of the USA PATRIOT Act. The rule establishes security threat assessment standards for determining whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a CDL. TSA will determine that an individual poses a security threat if he or she: (1) Is an alien (unless he or she is a lawful permanent resident) or a U.S. citizen who has renounced his or her U.S.